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### Respondents.

**FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER**

(1)

1           4. City of Marysville by Timothy L. McMahan, Assistant City  
2 Attorney.

3           The hearing was conducted at Seattle, Washington, on February 11  
4 and 12, 1991. The parties conducted settlement negotiations at the  
5 request and under the supervision of Judge Harrison on February 13,  
6 14, and 15, 1991, at Lacey. Settlement was not achieved, and the  
7 hearing resumed on February 19, 20, 22 and 25 and March 1 and 4, 1991,  
8 at Lacey. In all 8 days were devoted to the hearing on the merits.

9           Gene Barker and Associates provided court reporting services.

10           Witnesses were sworn and testified. Exhibits were examined.  
11 Briefs were filed and considered. The last brief was filed March 4,  
12 1991. From testimony heard and exhibits examined, the Pollution  
13 Control Hearings Board makes these

14                               FINDINGS OF FACT

15                                       I

16           This matter concerns the imposition of a potential sewer  
17 connection ban by the State Department of Ecology in the City of  
18 Marysville. The facts of the case can be divided into four  
19 categories: 1) the events which led to the ban, 2) the actions of  
20 appellant R/L Associates, 3) the actions of intervenor W. T. Withers,  
21 and 4) the events which have followed the ban. We take these up in  
22 turn.

II

Events Which Led to the Ban. Marysville operates a municipal sewage collection system. Collected sewage is channeled through mains to the Marysville sewage treatment plant located on the south side of the City. There the raw sewage is treated. The resulting effluent is discharged to Ebey Slough which flows to Port Gardner Bay.

III

Marysville's sewage treatment plant, like all others, is subject to a combined federal and state program known as the "National Pollutant Discharge Elimination System" (NPDES). The NPDES program arises from the Federal Clean Water Act, and applies nationwide.

IV

Under the federal-state NPDES program, effluent discharged to public waters must meet limitations. This is so regardless of the quality of the receiving waters. Effluent limitations, in turn, are based upon available technology.

V

In this case, the State Department of Ecology (Ecology) set the NPDES effluent limitations for Marysville in 1983 by issuance of an NPDES permit governing the effluent discharge of the sewage treatment plant. The pertinent effluent limitations were:

1. Biochemical Oxygen Demand (BOD<sub>5</sub>),  
monthly average: 30 milligrams per liter (mg/l), 300 lbs/day;

2. Suspended Solids, monthly average: 75 mg/l, 75 lbs/day.  
In addition, the maximum capacity of the plant was set by the NDPES permit at:

1. Monthly average flow . . . . . 1.2 million gallons  
per day (mgd)
2. Influent BOD<sub>5</sub> . . . . . 1440 lbs/day

VI

While the NPDES program focuses on the effluent limitations, the ability of the plant to meet those limits is directly affected by the capacity of the plant. Thus the NPDES permit provides influent limits to assure that the plant will achieve the effluent limits by operating within its capacity.

VII

In order to comply with effluent limitations it is essential that, as the number of homes and businesses increase, a corresponding increase be made in the capacity of the municipal sewage treatment plant. The evidence is compelling and persuasive that Marysville has, over the last decade, attended supportively to the increase of homes and businesses, while failing to increase the capacity of its sewage treatment plant. This has resulted in effluent being discharged to public waters which has persistently and recurrently exceeded federal-state limitations.

VIII

Ecology has provided a means for increasing capacity by

1 specifying in the 1983 NPDES permit that, when the actual flow or  
2 waste load reaches 85 percent of design capacity, Marysville shall  
3 submit a plan and schedule to maintain adequate capacity. In fact,  
4 the 85 percent warning level was exceeded during four months in 1983  
5 and increasingly thereafter until it was honored more by the breach  
6 than by the observation. Marysville submitted no plan in 1983 or 1984  
7 or 1985. During that period, Ecology had three engineers to monitor  
8 the effluent records of over 400 dischargers. In 1986 Ecology  
9 discovered that the Marysville plant was exceeding 100 percent of  
10 design capacity.

#### 11 IX

12 In July, 1986, Ecology wrote Marysville requesting that plans for  
13 increased capacity be submitted by January, 1987. By 1986,  
14 Marysville's plant was operating in recurring violation of both the  
15 influent and effluent limits of its NDPEs permit.

#### 16 X

17 In April, 1987, Marysville filed with Ecology a consultant's  
18 report summarizing necessary improvements to maintain the required  
19 capacity. The report did not meet regulatory criteria, was  
20 technically inadequate, and was confusing and sketchy.

#### 21 XI

22 In December, 1987, Ecology wrote Marysville indicating that it  
23 had several technical concerns with the plans submitted in April.  
24  
25  
26

1 Ecology indicated its willingness to approve the City's proposal for  
2 an increase of flow capacity from 1.2 million gallons per day (mgd) to  
3 2.8 mgd, upon future submission and approval of final plans by the  
4 City.

#### 5 XII

6 In May, 1988, Ecology sent to Marysville its written comments and  
7 concerns regarding the consultant's report filed by Marysville. The  
8 Ecology comments were ten pages in length, and stated substantial  
9 concerns.

#### 10 XIII

11 In July, 1988, Marysville's NPDES permit, for operation of its  
12 sewage treatment plant, expired. Ecology's rule only extends an  
13 existing NPDES permit where the holder applies for renewal at least  
14 one hundred eighty days prior to its expiration. WAC 173-220-180(2)  
15 and (5). Marysville did not apply for renewal of its NPDES permit at  
16 any time prior to its expiration. The plant has been operated since  
17 1988 with no NPDES permit.

#### 18 XIV

19 Marysville had not responded to Ecology's May, 1988, comments on  
20 the City consultant's report by September, 1989. In that month,  
21 Ecology again wrote to Marysville advising it of the necessity for  
22 planning and implementing greater capacity. Ecology's letter also  
23 detailed continuing violations by the plant of both influent and  
24

1 effluent limitations. Ecology's letter stated, "We are willing to  
2 work with and assist the City in this matter, but are looking to the  
3 City to exercise its responsibility in addressing this problem  
4 "Ecology closed the September, 1989, letter by recommending denial of  
5 any further connections to the sewer systems.

6 XV

7 In the same month, September, 1989, Marysville filed with Ecology  
8 a new engineering report on expanding plant capacity. The cover  
9 letter indicated that, "The report is almost a complete rewrite of the  
10 predesign engineering report that you previously reviewed and  
11 commented upon."

12 XVI

13 By an internal memorandum of November, 1989, Ecology's  
14 environmental engineer recommended issuance of a Notice of Violation.  
15 In the memorandum to his supervisor, Ecology's engineer noted  
16 Marysville's continuing violations of influent and effluent  
17 limitations. He noted also:

18 A revised engineering report was submitted to the  
19 Department of Ecology on September 29, 1989, which is  
20 currently in the review state. Our review of the  
21 report to date indicates that the report has not  
adequately addressed crucial items required by the  
regulations.

22 XVII

23 On February 14, 1990, Ecology served a Notice of Violation upon  
24  
25  
26

1 Marysville. The notice declared that it was issued pursuant to RCW  
2 90.48.120 and stated the opinion of Ecology that:

3 The City's NPDES permit expired on July 1, 1988, and  
4 the City has failed to apply for renewal of its permit  
5 in a timely manner. The City is discharging treated  
wastewater from its municipal treatment system without  
a valid permit, in violation of RCW 90.48.162.

6 During the effective term of the permit, the City of  
7 Marysville Wastewater Treatment facility operated above  
8 the BOD<sub>5</sub> design criteria stipulated in Condition S4.a  
9 of the permit from October 1984 to June 1988, the  
10 effluent from the wastewater treatment system was in  
11 non-compliance with Condition S1 of the permit. Thus,  
the City was operating the wastewater treatment system  
in non-compliance with the conditions of the permit in  
violation of RCW 90.48.180 and NPDES Permit No.  
WA-002249-7.

12 The Notice of Violation requested a full report, stating what steps  
13 are being taken to control waste. It stated that upon receipt of this  
14 report, Ecology would issue a further order.

15 XVIII

16 On February 26, 1990, in response to the Notice of Violation,  
17 Marysville adopted a self-imposed sewer ban. Acting by ordinance, No.  
18 1763, Marysville directed:

19 From and after the effective date of this  
20 Ordinance, the City shall not approve or allow any  
21 sewer extensions, connections, reconnections, or  
22 increases in meter size except those with vested  
rights in Section 2 below.

23 Section 2 went on to define vested rights as including:

24 Preliminary and final plats (and short plats) with  
25 sewer construction plans which have been approved by  
26



1 the City and with sewer extensions actually  
2 constructed across the frontage of the lot(s),  
including stub-outs at each lot.

3  
4 XIX

5 On March 8, 1990, Marysville wrote to applicants for land use  
6 permits notifying them of the Notice of Violation. The letter stated:

7 If satisfactory steps are not taken by the City  
8 toward bringing the wastewater treatment facility  
9 compliance (sic) within 30 days of this notice, the DOE  
may impose an absolute ban on new sewer connections, or  
invoke punitive measures. (emphasis added.)

10 XX

11 Both the ordinance, No. 1763, and the March 8, 1990, letter to  
12 land use permit applicants stated:

13 This Ordinance [No. 1763] is hereby adopted as a  
14 SEPA policy document of the City of Marysville. For  
15 the duration of this Ordinance, the City declares that  
16 any new development activity which will result in the  
17 discharge of wastewater into the City's sewer system  
18 will create a significant adverse environmental  
19 impact. No applications, hearings, or approvals shall  
be allowed for any such development activity without  
prior SEPA review relating to the sewer crises referred  
20 to in this Ordinance, and without a mitigation offer  
21 acceptable to the City and DOE . . . [Brackets] and  
22 emphasis added.]

23 XXI

24 On March 14, 1990, Ecology, following a press release, conducted  
25 a public meeting to receive comment concerning the Marysville  
26 situation. At that meeting Ecology officials mentioned the

1 possibility of a sewer ban.

2 XXII

3 On March 15, 1990, Marysville wrote to Ecology with a proposal to  
4 take interim measures to upgrade plant capacity to 2.8 mgd. This was  
5 first proposed by the City in 1987 (Finding of Fact XI, above), but  
6 without follow-through. The City's Interim proposal in 1990 involved  
7 installation of aerators to achieve the desired capacity of 2.8 mgd.

8 XXIII

9 Ecology and Marysville conferred over the prospective issuance of  
10 a further Ecology order. The public was not allowed to attend or give  
11 comment at these negotiations between Ecology and Marysville.

12 XXIV

13 On May 29, 1990, Ecology issued a "Consent Order" to Marysville.  
14 It envisions a permanent expansion of the plant resulting in  
15 substantially increased capacity. This is expected to be complete in  
16 September, 1993. In the meantime, the City must install aerators and  
17 take other interim measures. These will result in an interim  
18 capacity, of:

- 19 1. Monthly average flow . . . . . 2.8 mgd  
20 2. Influent BOD<sub>5</sub> . . . . . 4500 lbs/day

21 and effluent limitations of:

- 22 1. Biochemical Oxygen Demand (BOD<sub>5</sub>), monthly average:  
23 30 mg/l, 700 lbs/day;  
24 2. Suspended Solids: 75 mg/l, 1750 lbs/day.

1 XXV

2 The influent and effluent limitations of the Consent Order  
3 recognize the increased capacity of interim improvements. However, no  
4 change was made in the effluent concentration limits of 30 mg/l  
5 BOD<sub>5</sub> and 75 mg/l suspended solids. That is because the Marysville  
6 plant can meet those limits, provided that it is not overloaded.

7 XXVI

8 Primary sewage treatment is the first stage of sewage treatment  
9 and includes settling, screening and disinfection. Secondary sewage  
10 treatment is biological treatment using bacteria to consume organic  
11 wastes. The Marysville plant is a secondary sewage treatment plant.  
12 The effluent limitations assigned to secondary plants are appropriate  
13 to that superior technology, and so are stricter than effluent limits  
14 assigned to primary plants. A number of primary treatment plants  
15 remain operational with effluent limits less strict than those  
16 assigned to Marysville. That arises from inability to achieve better  
17 limitations with the out-dated technology. Primary plants have  
18 survived to this time due to a waiver claim addressed solely to plants  
19 with marine discharge. The marine waiver claims have terminated, and  
20 primary plants must convert to secondary treatment. The Marysville  
21 plant, which discharges to fresh water, never had a marine waiver  
22 claim, and has been a secondary plant at all times pertinent to this  
23 matter.

1 XXVII

2 Under the Consent Order issued by Ecology to Marysville, if the  
3 order's effluent limits are exceeded for a period of thirty days, a  
4 sewer connection ban shall arise automatically. The same is true with  
5 regard to influent limits. Thus, the order provides a "potential" ban  
6 which would remain "off" until exceedences at the plant trigger it  
7 "on."

8 XVIII

9 The Consent Order does not recognize the persons deemed vested by  
10 Marysville ordinance 1763. After the Consent Order, Marysville  
11 repealed ordinance 1763, replacing it with ordinance 1795 which  
12 substantially repeals the vesting provision of the earlier ordinance.

13 XXIX

14 On June 29, 1990, appellant R/L Associates filed its appeal of  
15 the Consent Order before us. On January 22, 1991, W.T. Withers was  
16 allowed to intervene to contest the Consent Order.

17 XXX

18 The Actions of Appellant R/L Associates. R/L Associates (RLA) is  
19 a corporation organized to acquire and develop real estate. RLA has  
20 selected a site of some 24 acres in Marysville which it wishes to  
21 acquire and develop into a subdivision of lots for single family homes.  
22  
23  
24  
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26

1 XXXI

2 RLA does not own the 24 acre site though part of the site (10  
3 acres) is under a promissory note given as earnest money. Acquisition  
4 is conditional upon plat approval.

5 XXXII

6 The 24 acre site selected by RLA was annexed by Marysville in  
7 March, 1988. The finding of the Snohomish County Boundary Review  
8 Board concerning utilities was:

9 *The primary reason for seeking annexation is to*  
10 *enable property owners to make their property more*  
11 *marketable and suitable for development; and because*  
12 *Marysville utilities are available to this area, it is*  
*likely that there will be significant growth of urban*  
*densities. Finding 3, page 1.*

3 XXXIII

14 In late 1988, RLA filed with Marysville a plat application  
15 proposing 108 lots for the 24 acre tract. During the plat review,  
16 Marysville certified the availability of city sewer to the site. The  
17 plat application was denied in August, 1989, for reasons unrelated to  
18 sewer.

19 XXXIV

20 On September 22, 1989, RLA filed with Marysville another plat  
21 application proposing 92 lots for the same site. RLA paid the  
22 applicable plat application fee. Marysville again certified the  
23 availability of city sewer to the site.  
24  
25

1 XXXV

2 Marysville determined, in reviewing RLA's plat application, that  
3 the site contained wetlands. The City therefore requested, on October  
4 12, 1990, that RLA prepare a wetlands study. RLA did so, and filed it  
5 on December 11, 1989. The study identified approximately 4 acres of  
6 wetland, and RLA accordingly reduced its proposal to 85 lots.

7 XXXVI

8 On January 16, 1990, Marysville issued a mitigated declaration of  
9 non-significance (MDNS) for RLA's 85 lot plat proposal. Because a  
10 final decision must follow an MDNS by 15 days (WAC 197-11-390(2)), the  
11 next date for consideration of RLA's plat proposal was the February  
12 13, 1990, regular meeting of the Marysville Planning commission. The  
13 RLA proposal did not come up on that agenda. Prior to the next  
14 regular meeting of the Planning Commission, on February 27, 1990, two  
15 things occurred. First Ecology issued its Notice of Violation to  
16 Marysville on February 14, 1990. Second Marysville adopted ordinance  
17 1763 on February 26, 1990. Ordinance 1763 declared that proposals  
18 which will result in discharge to city sewer would have a significant  
19 adverse environmental impact and require review under the State  
20 Environmental Policy Act (SEPA) prior to further hearing. RLA's plat  
21 application was therefore denied further hearing by Marysville pending  
22 completion of SEPA review. RLA has not obtained preliminary plat  
23 approval.

1 XXXVII

2 In Marysville, sewer plans are submitted for approval after  
3 preliminary plat approval. RLA has filed no sewer plans for its  
4 proposal.

5 XXXVIII

6 RLA has expended some \$60,000 in connection with its plat  
7 application. That figure includes legal fees associated with a civil  
8 action for damages against Marysville. It has no bank loan for  
9 development as these are generally unavailable during the potential  
10 sewer ban of the Consent Order.

11 XXXIX

12 The Actions of Intervenor, W.T. Withers. Intervenor, W.T.  
13 Withers, is a real estate developer. Mr. Withers has selected a site  
14 of some 39 acres in Marysville for development into a subdivision of  
15 lots for single family homes.

16 XL

17 The Withers site is adjacent to the RLA site. Withers and RLA  
18 are not affiliated. However, the same annexation which brought the  
19 RLA site into Marysville brought the Withers site in, also. The  
20 Boundary Review Board finding that Marysville utilities are available  
21 to the area (Finding of Fact XXXII, above), applies to the Withers  
22 site as well as the RLA site.

1 XLI

2 In 1989, Withers filed with Marysville a plat application  
3 proposing 125 lots for the 39 acre tract. Marysville's Utility  
4 Department reviewed the Withers plat proposal without denying the  
5 availability of city sewer. The preliminary plat was approved by  
6 Marysville on June 5, 1989.

7 XLII

8 At the time of preliminary plat approval, Withers had purchased  
9 the 39 acre site. In preparation for development Withers sought and  
10 obtained, in October, 1989, a bank loan of \$2,203,000.

11 XLIII

12 On September 26, 1989, Withers filed the sewer plan for his  
13 proposal with Marysville. On December 21, 1989, Marysville approved  
14 the sewer plans. Neither Withers nor Marysville filed the sewer plans  
15 with Ecology. Ecology neither knew of nor approved the Withers sewer  
16 plans.

17 XLIV

18 During 1989 and 1990, Withers cleared, graded and engaged in  
19 construction of roads, sewers, water and other utilities on the site.  
20 In addition, a 5 acre park was developed on the site. The total value  
21 of these improvements, which were transferred to Marysville in 1990,  
22 approximates \$2,000,000.



1 XLV

2 On February 26, 1990, Marysville's adoption of ordinance 1763 was  
3 construed to vest a right of sewer connection in 97 of the 125 Withers  
4 lots. This was the number with sewer stubs from the street to the  
5 lot. The other 28 lots were only days from being "stubbed out."  
6 However, with the issuance of the Consent Order by Ecology and  
7 Marysville's adoption of ordinance 1795, the vesting of even the 97  
8 lots was construed to be withdrawn by both Ecology and Marysville.

9 XLVI

10 As a result of having no assurance of sewer connection, Withers  
11 has sold, to builders, at \$40,000 per lot. Withers estimates the  
12 value of the same lot with assured sewer connection at \$56,000.  
13 Withers remains obligated for his \$2,203,000 bank loan.

14 XLVII

15 Events Which Have Followed the Ban. After the potential sewer  
16 ban of the Consent Order, Marysville filed with Ecology an improved  
17 engineering report for the permanent upgrade of its plant's capacity.  
18 Ecology will soon approve this report which is the fifth draft and  
19 which took Marysville four years to produce. Typically, approval of  
20 an engineering report requires two drafts and one year. If the report  
21 is implemented, as expected, by 1993, Marysville will have taken ten  
22 years to plan and upgrade the capacity of its plant. Typically, such  
23 planning and upgrading can occur within five years.

1 XLVIII

2 After the potential sewer ban of the Consent Order, Marysville  
3 filed with Ecology an outfall and water quality analysis. The  
4 receiving waters of Ebey Slough are classified as "A (excellent)"  
5 under the water quality classification system adopted by Ecology at  
6 chapter 173-201 WAC. However, the waters of Ebey Slough have been  
7 degraded below class A standards. This degradation probably resulted  
8 from several causes. The Marysville plant is the only source  
9 permitted to discharge to Ebey Slough, and it has consistently  
10 exceeded effluent limits. It is probable that the plant is a  
11 contributing cause to the degraded water quality in Ebey Slough. The  
12 outfall report filed by Marysville concludes that Ecology's dilution  
13 requirements cannot be met by discharge to Ebey Slough, and that the  
14 outfall and discharge should go elsewhere, such as Steamboat Slough or  
15 the Snohomish River.

16 XLIX

17 After the potential sewer ban of the Consent Order, Marysville  
18 installed aerators and took other measures to upgrade capacity in the  
19 interim until the permanent upgrade of 1993. This interim upgrade of  
20 capacity was the first physical increase in plant capacity since 1983.

21 L

22 After the potential sewer ban of the Consent Order and the  
23 resulting interim upgrade of plant capacity, the consistent pattern of  
24  
25  
26

1 influent and effluent exceedences was halted. This pattern of  
2 exceedence had prevailed for a least five and perhaps as many as seven  
3 years depending on the limit exceeded. The Marysville plant came into  
4 compliance, as to the important limitations of BOD influent and  
5 effluent by poundage, during August, 1990. It has remained in  
6 substantial compliance for the six months through January, 1991, the  
7 last month of available data on this record.

8 LI

9 At the time of the potential sewer ban of the Consent Order,  
10 there was a backlog of growth-induced demand for Marysville sewer  
11 service. The demand was from the following sources. It is expressed  
12 both in influent BOD<sub>5</sub>, pounds per day to the plant (ppd) and the  
13 number of residential equivalent units (REU). An REU is the the sewer  
14 loading of one average residence. An industrial source may therefore  
15 produce several REUs. These figures assume 2.8 persons per residence  
16 and 0.2 ppd of BOD per person which is .56 ppd per residence:

	BOD ppd	REU
19 I. <u>Schools</u>	48	86
20 II. <u>Single family lots</u> with sewer stubs as recognized by ordinance 1763 (includes <u>97 of Wither's</u> 125 lots).	224	400
22 III. <u>Single family lots</u> with sewer plan approval by city but no sewer stubs (includes <u>28 of Wither's</u> 125 lots).	170	304
24 IV. <u>Multi-family units</u> with no sewer plan approval and no site plan approval.	141	252

	BOD ppd	REU
V. <u>Multi-family units</u> with no sewer plan approval, but with site plan approval.	124	221
VI. <u>Single-family lots</u> with preliminary plat approval, but no sewer plan approval.	185	330
VII. <u>Single-family lots</u> with no preliminary plat approval and no sewer plan approval (includes <u>RLA's 85 lots</u> ).	336	600
VIII. <u>Industrial or Commercial</u>	50	89
<u>TOTAL</u>	<u>1,278</u>	<u>2,282</u>

At the time of the Consent Order, Marysville's plant lacked capacity for its existing loading, while there were proposals filed to add the equivalent of 2,282 more homes as shown above.

#### LII

In Marysville there is a sewer connection fee. One must first obtain a building permit before paying the sewer connection fee.

Section 14.01.030 of the Marysville Municipal Code provides:

*No [application for utility service] shall be deemed accepted or granted by the City, and no vested right to utility service shall accrue, unless and until all prerequisites for approval, as specified by ordinance or resolution, are complied with in full and to the satisfaction of the City. [Brackets added.]*

#### LIII

It is unlikely that the proposed equivalent of 2,282 homes would

1 seek to connect at one time or even in one year. In past years there  
2 have been the following number of sewer connections in Marysville:

3	<u>Year</u>	<u>Number of Connections</u>
4	1979	526
5	1980	223
6	1981	130
7	1982	79
8	1983	181
9	1984	195
10	1985	262
11	1986	245
12	1987	220
13	1988	260
14	1989	500
15	1990	486

16 These numbers are largely market driven. At the recent rate of 500  
17 per year and two and one-half years to the predicted permanent upgrade  
18 of plant capacity in September, 1993, there would be 1,250 additional  
19 connections. A greater demand for housing in Marysville could result,  
20 of course, in a greater number of connections being sought.

21 LIV

22 The data on this record show a correlation between large levels  
23 of BOD influent and BOD effluent. The data also show substantial  
24 compliance with the BOD influent and effluent limitations during and  
25 after August, 1990, when the aerators installed by Marysville began to  
26 show an effect.

1 The data are as follows:

2		<u>BOD in (ppd)</u>	<u>BOD out (ppd)</u>
3	<u>Consent Order Limit:</u>	<u>4500 ppd</u>	<u>700 ppd</u>
4	January, 1990	2489	725
5	February	2970	672
6	March	6657	930
7	April	5165	946
8	May	3935	773
9	June	4290	1381
10	July	5694	1279
11	August	4483	680
12	September	3569	885
13	October	3297	558
14	November	3077	582
15	December	2648	286
16	January, 1991	3768	376

17 For the six month period August, 1990, through January, 1991, the  
18 average "BOD in" was 3474 ppd. This represents operation of the plant  
19 after interim measures to increase its capacity. However, as shown by  
20 the 1990 data the spring and summer may show elevated influent. This  
21 is probably due to food processing, and other industrial activity  
22 which may not operate in the fall and winter. Marysville has  
23 attempted to prescribe limits for industrial discharge to city sewer,  
24 but neither it nor Ecology are certain that industrial dischargers  
25 have, or are meeting, limits.

26 LV

27 The interim measures by Marysville pursuant to the Consent Order  
have created plant capacity.

1 Available plant capacity is estimated as follows:

2  
3 . Estimated Capacity =  $\frac{700 \text{ ppd BOD out}}{1.00 - 0.825} = 4,000 \text{ ppd}$

4 . Existing Load (5 month average) =  $\frac{(3,425 \text{ ppd})}{585 \text{ ppd}}$

5 . Population equivalent based on 0.2 lbs/BOD/capita:  
6  $\frac{585}{0.2} = 2,925 \text{ people}$

7  
8 . "Residential equivalent units" (REU) based on 2.5  
9 people per REU:  
 $\frac{2925}{2.5} = 1170 \text{ REUs}$

10  
11 LVI

12 Ecology agrees that interim plant improvements since the Consent  
13 Order would allow a "discreet number" of additional sewer  
14 connections. Because the spring and summer industrial loading may  
15 reduce available capacity, Ecology would prefer a calculation using 12  
16 months rather than only 5 months. However, the above formula for  
17 plant capacity does include assumptions which would offset the effect  
18 of using part-year data. Specifically, the formula assumes an influent  
19 limit of 4,000 ppd BOD when the Consent Order allows 4,500 ppd. Also,  
20 the formula assumes 82.5% BOD removal (monthly average) while plant  
21 performance since August, 1990, has been approximately 84%.

22 LVII

23 Two further changes in the calculation of plant capacity would  
24 assure a reliable result. First, the 6 month average of influent BOD

1 should be substituted for the 5 month average (3,474 in lieu of  
2 3,415). Second, the more cautious estimate of 2.8 persons per  
3 residence (REU) should be substituted for 2.5 persons. With these  
4 modifications, the formula yields a capacity for 940 additional sewer  
5 connections. That figure is a reasonable, conservative and prudent  
6 expression of the plant capacity now available.

7 LVIII

8 Any Conclusion of Law deemed to be a Finding of Fact is hereby  
9 adopted as such. From these Findings of Fact, the Board makes these

10 CONCLUSIONS OF LAW

11 I

12 This matter is the review of a Department of Ecology regulatory  
13 order issued under RCW 90.48.120(1). The order at issue is entitled  
14 "Consent Order", and involves a potential ban of sewer connections in  
15 Marysville.

16 II

17 The test for a regulatory order under RCW 90.48.120 is whether it  
18 is "appropriate under the circumstances" to accomplish the purposes of  
19 the Washington State Clean Water Act, chapter 90.48 RCW. Protect  
20 Ludlow Bay v. Department of Ecology, et. al., PCHB No. 84-49 (1985)  
21 and RCW 90.48.120. The standard and scope of our review is de novo.  
22 WAC 371-08-183. Our review is to determine whether the order in  
23 question is appropriate in this case. Ludlow, supra.



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III

Appellants challenge the potential sewer ban of the Consent Order as being inappropriate under some or all of these four headings 1) authority for issuance 2) vested rights 3) estoppel and 4) reasonableness. Our conclusions in each of these follow.

IV

Authority for Issuance. Under RCW 90.48.120(1):

(1) Whenever, in the opinion of the department, any person shall violate or creates a substantial potential to violate the provisions of this chapter, or fails to control the polluting content of waste discharged, or to be discharged into any waters of the state, the department shall notify such person of its determination by registered mail. Such determination shall not constitute an order or directive under RCW 43.21B.310. Within thirty days from the receipt of notice of such determination, such person shall file with the department, a full report stating what steps have been and are being taken to control such waste or pollution or to otherwise comply with the determination of the department. Whereupon the department shall issue such order or directive as it deems appropriate under the circumstances, and shall notify such person thereof by registered mail. (Emphasis added.)

In this case, Marysville has violated chapter 90.48 RCW ("this chapter") by 1) discharging effluent to public waters in excess of the limitations of its NPDES permit and 2) continuing its discharge with no NPDES permit, all in violation of RCW 90.48.162 requiring municipal corporations to possess and comply with waste disposal permits. The requirement of RCW 90.48.162 is for compliance with a permit requiring "all known, available and reasonable methods of treatment" prior to

1 discharge "regardless of the quality of the water of the state to  
2 which wastes are discharged." RCW 90.52.040 cited in RCW 90.48.162  
3 See also RCW 90.54.020(3)(b). In addition, Ecology is designated as  
4 the agency for implementation of the Federal Clean Water Act. RCW  
5 90.48.260. The permit requirements of RCW 90.48.162 thus makes  
6 mandatory federal effluent limitations. WAC 173-220-130(1)(a).  
7 Marysville has consistently exceeded effluent limitations based upon  
8 the foregoing authority originating under chapter 90.48 RCW. Ecology  
9 has the authority, following issuance of a notice of violation as  
10 occurred here, to issue a Consent Order containing a potential sewer  
11 connection ban. That authority is found at RCW 90.48.120(a).<sup>1/</sup>

12 V

13 Further authority for a Consent Order containing a potential  
14 sewer connection ban is found at RCW 90.48.260 which provides that:

15 . . . Program elements authorized herein may include,  
16 but are not limited to:  
17 . . . i) enforcement of the program through penalties,  
18 emergency powers and criminal sanctions.  
19 RCW 90.48.260(1), emphasis added.

20 <sup>1/</sup> Intervenor, Withers, has asserted that Ecology's authority to  
21 issue the Consent Order allows Ecology to modify it. While that  
22 proposition is generally true, Ecology may not, without the agreement  
23 of all parties, modify the terms of an order on appeal before us.  
24 Intervenor has offered an exhibit, Ex. 270, purporting to be a  
25 modification of the appealed order which was reached without the  
26 agreement of appellant herein. This agreement is ineffective either as  
27 a modification or a settlement. Okanogan County v. Department of  
Ecology, PCHB No. 86-213 (1987) cited by intervenor is not to the  
contrary as that case involved withdrawal of an order by Ecology, not  
modification.

1 This section contemplates enforcement in terms which are broad enough  
2 to encompass the type of civil, regulatory order represented by the  
3 Consent Order.

#### 4 VI

5 Appellant and Intervenor contend that a Consent Order imposing a  
6 potential sewer ban violates the following policy of chapter 90.48 RCW:

7 It is declared to be the public policy of the State  
8 of Washington to maintain the highest possible  
9 standards to insure the purity of the waters of the  
10 State consistent with public health and public  
11 enjoyment thereof, of propagation and protection of  
12 wildlife, birds, game, fish and other aquatic life,  
13 and the industrial development of the State, and to  
14 that end require the use of all known available and  
15 reasonable methods by industries and others to prevent  
16 and control the pollution of the waters of the State  
17 of Washington . . . (Emphasis added.)

18 However, the reference to the "purity of all waters" and "industrial  
19 development" assumes the purity will be achieved by industry's  
20 limitation of effluent discharge through the use of all known,  
21 available and reasonable methods. This policy does not address  
22 Ecology orders once reasonable methods are abandoned by overloading a  
23 sewage treatment plant. The authority for Ecology's orders rests in  
24 RCW 90.48.120 and -.260 which are not at odds with the policy of RCW  
25 90.48.110.

#### 26 VII

27 Appellant and intervenor suggest, also, that Ecology has no  
authority to issue an order containing a connection ban because: 1)

1 there is no express reference to a connection ban in chapter 90.48  
2 RCW, 2) there are no regulations specifying that a connection ban may  
3 be imposed 3) WAC 173-220-230 lists enforcement measures and does not  
4 mention connection bans and 4) a connection ban has the effect of a  
5 penalty. We find these contentions to be without merit. First, the  
6 authority to issue enforcement orders provided by RCW 90.48.120 and  
7 -.260 is not diminished by the lack of express reference to sewer  
8 connection bans or any other specific categories of order. Those  
9 statutes empower Ecology broadly to issue appropriate orders. The  
10 federal case of Montgomery Environmental Coalition v. Castle, 646 F.2d  
11 568 (D.C. Cir. 1980) recognizes the propriety of a sewer connection  
12 ban in the context of the U.S. Environmental Protection Agency's role  
13 as NPDES administrator. That is the role undertaken here by Ecology  
14 under RCW 90.48.260. Thus, Ecology may implement a sewer connection  
15 ban when necessary to achieve and maintain compliance. Second, the  
16 enforcement authority of RCW 90.48.120 and -.260 bears the safeguard  
17 that orders be "appropriate under the circumstances" and thus is  
18 sufficiently precise for direct implementation without regulations  
19 expressly providing for a sewer connection ban. See Weyerhaeuser v.  
20 Air Pollution, 91 Wn.2d 77, 586 P.2d 1163 (1978). Third, WAC  
21 173-220-230 lists enforcement options which are in addition to, and  
22 not exclusive of, orders under RCW 90.48.120 and -.260. Lastly, the  
23 objective of a sewer connection ban is largely remedial, to promote  
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1 future compliance, akin to civil penalties which Ecology has authority  
2 to issue. RCW 90.48.260(1)(i).

3 VIII

4 Appellant, RLA, asserts that the potential sewer ban of the  
5 Consent Order violates the Fourteenth Amendment to the United States  
6 Constitution. We lack jurisdiction to resolve constitutional issues.  
7 Yakima County Clean Air Authority v. Glascam Builders, Inc., 85 Wn.2d  
8 255, 534 P.2d 33 (1975).

9 IX

10 Vested Rights. Appellant, RLA, urges that its application for  
11 plat approval vests it to a right of sewer connection because the ban  
12 of the Consent Order and associated ordinances had not taken effect on  
13 the date of the plat application. We disagree.

14 X

15 Plat approval is not sewer approval. Even had RLA obtained plat  
16 approval, it would have been obliged to submit its sewer plans to  
17 Ecology for approval. RCW 90.48.110 and WAC 173-240-030. Under the  
18 review standards of WAC 173-240-040, no sewer approval may be granted  
19 unless:

20 . . . the proposed facilities will be designed,  
21 constructed, operated, and maintained to meet effluent  
22 limitations and other requirements of an NPDES or state  
23 waste discharge permit, if applicable, and to meet the  
24 policies and requirements of chapters 90.48 and 90.54  
25 RCW pertaining to prevention and control of pollution  
26 of waters of the state . . .

1 At all times from RLA's plat application to issuance of the Consent  
2 Order ban, Marysville's plant was overloaded and in regular violation  
3 of chapter 90.48 RCW. Had RLA submitted sewer plans, the additional  
4 loading would have aggravated that violation. RLA's sewer plans could  
5 not have been approved under WAC 173-240-040.

6 XI

7 The sewer plan approval process of RCW 90.48.110 and the  
8 regulatory order process of RCW 90.48.120 are enforcement devices  
9 which work in tandem. They assure that effluent discharges to the  
10 public waters are held within the limits of chapter 90.48 RCW. The  
11 substantive effluent limits and other requirements of chapter 90.48  
12 RCW have been in effect at all times pertinent to this appeal.

13 XII

14 As explained in Norco Construction, Inc. v. King County, 97 Wn.2d  
15 680, 649 P.2d 103 (1982) a plat applicant is entitled to the land use  
16 restrictions that exist at the conclusion of the 90 day period after  
17 plat application. Had RLA sought sewer plan approval from Ecology  
18 either during or after that period, no approval would be allowed by  
19 RCW 90.48.110 even before the ban of the Consent Order issued under  
20 RCW 90.48.120. That is because the "land use regulation" consists of  
21 the substantive requirements of chapter 90.48 RCW imposing limitations  
22 on sewer effluent discharged to the public waters. Unlike Norco this  
23 land use regulation did not change during the time in  
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1 question, nor has RLA's proposal to add sewer loading ever been  
2 consistent with the substantive requirements of chapter 90.48 RCW.  
3 There is no vested right of sewer connection held by appellant, RLA.

#### 4 XIII

5 Estoppel. By the same analysis applicable to RLA, there is no  
6 vested right of sewer connection held by intervenor Withers. However,  
7 Withers contends that sewer plan approval granted by Marysville,  
8 estops Ecology from imposing a sewer ban against him. The elements of  
9 estoppel are:

10 1) an admission, statement or act inconsistent with  
11 a claim afterwards asserted, 2) action by another in  
12 reliance upon that act, statement or admission, and 3)  
13 injury to the relying party from allowing the first  
party to contradict or repudiate the prior act,  
statement or admission.

14 Board of Regents v. Seattle, 108 Wn.2d 545, 551, 741 P.2d 11 (1987).

15 Withers has failed to establish the first element of estoppel.

16 Ecology, the exclusive agency to approve sewer plans under  
17 RCW 90.48.110, never made any admission, statement or act towards  
18 Withers. Indeed, Withers completely failed to submit sewer plans to  
19 Ecology for approval. There is no admission, statement or act of  
20 Ecology towards Withers with which the ban of the Consent Order can be  
21 inconsistent. Ecology is not estopped from applying the ban of the  
22 Consent Order to intervenor, Withers.

#### 23 XIV

24 Reasonableness. The requirement of reasonableness arises from  
25

1 the admonition of RCW 90.48.120 that the order issued by Ecology be  
2 "appropriate under the circumstances." The circumstances are: 1)  
3 persistent, recurrent and significant exceedence of federal-state  
4 effluent limitations for a period of at least five years, 2) tardiness  
5 in submitting adequate engineering plans to stem the chronic  
6 overloading which caused exceedence of the limitations, 3) failure to  
7 seek an NPDES permit prior to the expiration of the 1983-1988 NPDES  
8 permit and 4) effluent discharges from the plant which are a  
9 contributing cause to the degraded quality of the receiving waters of  
10 Ebey Slough. In these circumstances the potential sewer ban of the  
11 Consent Order was both appropriate and reasonable.

12 XV

13 Appellant and intervenor assert that the limitations of the  
14 Consent Order which trigger the ban should be more permissive for two  
15 reasons. First, that other communities have more permissive  
16 limitations when primary treatment plants are involved. Yet, under  
17 WAC 173-220-130 implementing the NPDES permit program:

18 . . . The effluent limitations shall not be less  
19 stringent than those based upon the treatment facility  
20 design efficiency . . .

21 This means that a secondary plant, such as Maryville's, must meet  
22 secondary effluent limitations like those imposed by the Consent  
23 Order, regardless of less stringent limits on primary treatment  
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1 plants. Secondly, appellant and intervenor urge that WAC  
2 173-221-050(2)(a) allows waiver of the BOD effluent concentration from  
3 30 mg/l per the Consent Order to 45 mg/l and the BOD removal from 85%  
4 per the Consent Order to 65%. However, WAC 173-221-050(2)(C) requires  
5 effluent concentrations:

6       Notwithstanding (a) and (b) of this subsection, not  
7       any less stringent than "effluent concentrations  
8       consistently achievable through proper operation and  
9       maintenance" of the wastewater facility based upon an  
10      analysis of past performance.

11 Based upon past performance, the Marysville plant can meet the 30 mg/l  
12 and 85% BOD requirements of the Consent Order when properly operated  
13 within its capacity. We conclude that these limitations which may  
14 trigger the ban should not be more permissive.

#### 15 XVI

16 Issuance of the Consent Order with its potential sewer ban was  
17 reasonable in that it prompted Marysville to add plant capacity when  
18 all prior measures had failed. That very capacity, however, is a new  
19 circumstance requiring reappraisal of the Order at the present time.

#### 20 XVII

21 We conclude that the Consent Order, to remain appropriate, must  
22 be conditioned to allow use of the capacity which its issuance brought  
23 about. While we acknowledge that the connection ban of the Order is  
24 potential, rather than absolute, even a potential ban has caused the  
25 withdrawal of financing which is antecedent to the development that  
26 would use the capacity. For that reason, a discreet number of

1 additional sewer connections should be authorized by the Order, but  
2 free of its potential sewer ban. We have found that as of January 31,  
3 1991, the last date for which data are available, there is capacity  
4 for 940 additional sewer connections. That is the number which should  
5 be authorized free of the potential sewer ban.

6 XVIII

7 The Consent Order should be conditioned by adding the following  
8 language to render it "appropriate under the circumstances" under RCW  
9 90.48.120."

10 There shall be 940 sewer connections (residential  
11 equivalent units) which may be authorized by Marysville  
12 from January 31, 1991, until the fulfillment of this  
13 Order, as specified in paragraph X.E.6. These 940  
14 connections shall be exempt from any potential sewer  
15 ban under this Order. These 940 connections shall not  
16 be diminished but may, on new and significant  
17 information, be increased under XVII (Re-Opener) of  
18 this Order.

19 XIX

20 The 940 exempt sewer connections should be apportioned according  
21 to the sound discretion of Marysville.

22 XX

23 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
24 adopted as such.

25 From these Conclusions of Law, the Board enters the following

1 ORDER

2 The Consent Order is remanded to the Department of Ecology with  
3 instructions to add the condition set forth in Conclusion of Law  
4 XVIII, hereof. As so amended, the Consent Order is affirmed.

5 DONE at Lacey, WA, this 26<sup>TH</sup> day of April, 1991.

6 POLLUTION CONTROL HEARINGS BOARD

7 *Harold S. Zimmerman*  
8 HAROLD S. ZIMMERMAN, Member

9 *Annette S. McGee*  
10 ANNETTE S. MCGEE, Member

11 *William A. Harrison*  
12 WILLIAM A. HARRISON  
13 Administrative Appeals Judge